Sanlaiman Sdn Bhd v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC(ARB)-7–02 OF 2012
MOHAMAD ARIFF J
20 SEPTEMBER 2012

Arbitration — Award — Error of law — Whether arbitrator's findings in award illogical or self-contradictory — Whether seemingly contradictory findings within award actually concerned proper findings on separate issues and did not render award erroneous

On the ground there was an error of law on the face of an arbitral award ('the award'), the plaintiff, which was the claimant in the arbitration, applied to the High Court under s 42 of the Arbitration Act 2005 to have the award set aside or varied or remitted back to the arbitrator for further action. The plaintiff was appointed by the defendant as the main contractor for a construction project and had received several warning and reminder letters from the latter that the progress of its work was slow and not in keeping with the time-line for the project's completion. The plaintiff had applied for two extensions of time — respectively of four months and three months — to complete, but the defendant only allowed one 30-day extension. Despite granting the extension, the defendant issued the plaintiff a notice of default and followed that up with a certificate of non-completion ('CNC'), a claim for liquidated and ascertained damages ('LAD') and finally a letter terminating the contract. The plaintiff disputed the termination claiming it had completed more than 90% of the works and referred the matter to arbitration. The arbitrator ruled, inter alia, that the plaintiff was entitled to complete the project within a reasonable time as the time for completion had been set 'at large' and that the defendant's issuance of the CNC and the imposition of LAD were wrongful and invalid. He, however, held the defendant's termination of the contract was lawful and valid. The plaintiff argued that it was illogical for the arbitrator to hold the termination to be valid when he had already found that the time for completion was set 'at large'.

Held, dismissing the claim with costs:

(1) There was no error of law on the face of the award or arising out of the award (see para 49).

(2) The arbitrator had considered the evidence in relation to the failure to 'proceed regularly and diligently with the works' and came to firm findings of fact on the evidence that the notice of default and the subsequent termination was not mala fide, unconscionable or wrongful.

The arbitrator found the plaintiff's argument that 'the CNC itself would have superseded the event complained of in the notice of default' untenable as they were both different and unrelated provisions in the contract (see para 41).

(3) Seen in its entirety, the findings in the award were not illogical or inconsistent. The arbitrator came to definite findings on the evidence and found the issues of CNC and extension of time to be separate from the issue of failure to proceed regularly and diligently with the works which afforded a cause for termination under cl 51 of the contract. It could not plausibly be concluded that on the facts no reasonable arbitrator would have reached the same conclusions (see para 47).

[Bahasa Malaysia summary

Atas alasan terdapat kesilapan undang-undang atas award timbang tara ('award'), plaintif, yang mana adalah penuntut di dalam timbang tara, memohon kepada Mahkamah Tinggi di bawah s 42 Akta Timbang Tara 2005 untuk award tersebut diketepikan atau dipelbagaikan atau diremit balik kepada penimbang tara untuk tindakan selanjutnya. Plaintif dilantik oleh defendan sebagai kontraktor utama atau untuk projek pembinaan dan telah menerima beberapa amaran dan surat-surat peringatan daripada defendan bahawa kemajuan kerjanya adalah perlahan dan tidak mengikut dengan garis masa untuk siap projek. Plaintif memohon untuk dua pelanjutan masa masing-masing untuk empat bulan dan tiga bulan – untuk siap, tetapi defendan hanya membenarkan satu pelanjutan 30 hari. Walaupun memberikan pelanjutan tersebut, defendan menyerahkan kepada plaintif notis keingkaran dan mengikutinya dengan sijil tidak siap ('CNC'), tuntutan untuk ganti rugi yang ditetapkan ('LAD') dan akhirnya surat menamatkan kontrak tersebut. Plaintif mempertikaikan penamatan tersebut mendakwa ia telah siapkan lebih daripada 90% kerja-kerja dan merujuk perkara tersebut kepada timbang tara. Penimbang tara memerintahkan, antara lain, bahawa plaintif berhak untuk menyiapkan projek tersebut dalam masa munasabah memandangkan masa untuk siap telah ditetapkan 'at large' dan bahawa penyerahan CNC defendan dan pengenaan LAD adalah salah dan tak sah. Dia walau bagaimanapun, memutuskan penamatan kontrak oleh defendan adalah sah di sisi undang-undang. Plaintif berhujah bahawa adalah tidak logik untuk penimbang tara memutuskan penamatan adalah sah apabila beliau telah mendapati bahawa masa untuk siap ditetapkan 'at large'.

Diputuskan, menolak tuntutan dengan kos:

(1) Tidak terdapat kesilapan undang-undang atas award atau berbangkit daripada award tersebut (lihat perenggan 49).

(2) Penimbang tara telah mempertimbangkan keterangan berkaitan kegagalan untuk 'proceed regularly and diligently with the works' dan

mencapai kepada dapatan fakta yang kukuh atas keterangan bahawa notis keingkaran dan penamatan selanjutnya bukan mala fide, tidak berpatutan atau salah. Penimbang tara mendapati hujahan plaintif bahawa 'the CNC itself would have superseded the event complained of in the notice of default' tidak dapat dipertahankan memandangkan kedua-dua berbeza dan peruntukan-peruntukan yang tidak berkait di dalam kontrak (lihat perenggan 41).

(3) Melihat secara keseluruhannya, dapatan dalam award adalah logik dan konsisten. Penimbang tara mencapai kepada dapatan yang kukuh atas keterangan dan mendapati isu-isu CNC dan pelanjutan masa hendaklah diasingkan daripada isu kegagalan untuk meneruskan kerja-kerja dengan kerap dan bersungguh-sungguh yang mana menyebabkan penamatan di bawah klausa 51 kontrak. Ia tidak dapat disimpulkan dengan munasabah bahawa atas fakta tiada penimbang tara yang munasabah akan mencapai kesimpulan yang sama (lihat perenggan 47).]

Notes

For a case on error of law, see 1(1) *Mallal's Digest* (4th Ed, Reissue) para 1689.

Cases referred to

Antaios Cia Naviera SA v Salen Rederierna AB; The Antaios [1984] 3 All ER 229, HL (refd)

Cairn Energy India Pty Ltd & Anor v The Government of India [2009] 6 MLJ 795; [2010] 2 CLJ 420, CA (refd)

Chai Ming v The Overseas Assce Corpn Ltd [1962] MLJ 282 (refd)

Champsey Bhara & Co v Jivraj Baloo Spinning and Weaving Co [1923] AC 480, PC (refd)

David M Sapp et al, Appellants v Abraham Barenfeld et al, Respondents (Supreme Court of California), 34 Cal 2d 515, SC (refd)

David Taylor & Son Ltd v Barnett Trading Co [1953] 1 WLR 562, CA (refd)

Edwards v Bairstow [1956] AC 14, HL (refd)

Ganda Edible Oils v Transgrain BV [1988] 1 MLJ 428, SC (refd)

Gold & Resource Development (NZ) Ltd v Dough Hood Ltd [2000] 3 NZLR 318, CA (refd)

Government of India, The v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)

Maimunah Deraman v Majlis Perbandaran Kemaman [2010] MLJU 1711; [2011] 9 CLJ 689, HC (refd)

Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (refd)

Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113; [2007] 3 CLJ 185, CA (refd)
Perkins Restaurants Operating Co, LP v Van Den Bergh Foods Co (1995) 276 111 App 3d 305 (refd)
Pioneer Shipping Ltd and others v BTB Tioxide Ltd; The Nema [1981] 2 All ER 1030, HL (refd)
Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd [2000] NZLR 338, PC (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd)

Legislation referred to

Arbitration Act 2005 s 42

Lye Wing Voi (Yap Hsu-Lyn with him) (Lye & Yap) for the plaintiff.
Noerazlin (Catherine Licholas with her) (Attorney General Malaysia, Attorney General's Chambers) for the defendant.

Mohamad Ariff J:

INTRODUCTION

[1] The plaintiff applies to this court under s 42 of the Arbitration Act 2005 for this court's determination on several questions of law arising out of an arbitral award as specified in Annexure A to the originating summons. In addition, the plaintiff prays that the award dated 20 January 2012 be set aside and/or varied to the extent the plaintiff's claim in the Annexure B is allowed with interest and costs. In the alternative, the plaintiff prays that the award together with the court's determination on the questions of law be remitted to the arbitral tribunal to quantify the plaintiff's claims.

GOVERNING PRINCIPLES UNDER S 42 OF THE ARBITRATION ACT 2005

[2] I have given due attention and full consideration to the principles governing the exercise of this court's jurisdiction under s 42 of the Act as elaborated in several recent cases after the coming into force of the 2005 Act. The requirements under s 42 are strict and it is necessary for the applicant to specify in very clear terms the exact questions of law and that he requires the determination of the court.

[3] These basic requirements under s 42 have been satisfied by the plaintiff

since the questions of law to be determined have been clearly identified and formulated, and the grounds on which the reference was sought also adequately stated. By way of support, the observations in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83 are apt:

> When relief under section 42 is sought, there is a duty and obligation to state the question of law arising from the award in a concise manner, and state the grounds on which the reference is sought; in addition, I will say, must state the facts leading to the grounds, failing which the relief will not be granted (per Hamid Sultan Abu Backer J at p 101 of the report).

[4] See also *Maimunah Deraman v Majlis Perbandaran Kemaman* [2010] MLJU 1711; [2011] 9 CLJ 689. As far as the questions of law are concerned, they must also, in the words of the statutory formula, be questions 'arising out of an award'. Such a question of law cannot simply be said to arise out of the arbitration generally, but must arise 'out of the award'. This distinction preserves the established law on 'error of law on the face of the award', and the parties in this action are on common ground in this respect. Counsel for the plaintiff has cited, inter alia, the case of *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766. These general principles were alluded to in that case and I take the liberty to reproduce the relevant passages below:

> … it will be unwise for any Malaysian court to conclude in favour of an extended jurisdiction under s 42 of our Arbitration Act 2005, even for domestic arbitral awards, as urged by counsel for the plaintiff. That the courts in Malaysia should take a limited view of its jurisdiction under s 42 also finds support in the views expressed by the learned authors of Sundra Rajoo & Davidson, *The Arbitration Act 2005* (2007) who are of the view that a 'strict approach' should be applied by Malaysian courts, and the fact that the Malaysian Act has omitted the leave requirement makes it all the more necessary for a strict approach to be adopted. See paras 42.10–42.11, p 201 of this commentary:
>
> 'The scope of the words 'arising out of an award' in the English 1979 Act was discussed at length in the English Court of Appeal case of *Universal Petroleum Co v Handels und Transport GmbH* [1987] 1 WLR 1178, counsel for the appellant argued that a wide scope should be given to these words …
>
> … What needs to be emphasised as pointed out Kerr LJ is that the question of law must arise out of the award itself and not out of the arbitration. Whether or not the test is identical, it certainly does not differ much from the old test which apply to 'errors on the face of the award'. Viewed in this light, there should be no danger of 'opening the floodgates' to peripheral issues arising in the case of the arbitration but not on the award. We are of the view that the strict approach adopted in *Universal Petroleum* should be applied to the Malaysian courts since the words of the statute of the same. The fact that the Malaysian Act has omitted leave requirements makes it all the more necessary for a strict approach to be adopted.

SCOPE OF THE COURT'S JURISDICTION ON ERROR OF LAW ARISING OUT OF AWARD

[5] The scope of the court's jurisdiction to set aside, vary or remit an award on the basis of error of law on the face of the award is a narrow one. The distinction is drawn between an error of law in relation to a specific question of law addressed to the arbitral tribunal for its determination, and a question of law which arises during the course of the arbitration proceedings. In the case of the former, the decision of the arbitral tribunal should be regarded as final, but in the case of the latter the court can interfere, and if necessary, set aside the award on relatively narrow grounds established through the case authorities. See *Cairn Energy India Pty Ltd & Anor v The Government of India* [2009] 6 MLJ 795; [2010] 2 CLJ 420 (Court of Appeal).

[6] The Privy Council in *Champsey Bhara & Co v Jivraj Baloo Spinning and Weaving Co* [1923] AC 480 explained this jurisdiction as follows:

> An error of law on the face of the award means … that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous (per Lord Dunedin).

[7] See also *Chai Ming v The Overseas Assce Corpn Ltd* [1962] MLJ 282, which applies *Champsey Bhara*, where the principle is explained further thus: '… the law is that in determining whether an award should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value'. (per Suffian J (as he then was) at p 283).

[8] *Halsbury's Laws of England* states:

> [w]here the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

[9] See eg *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401, where this passage was cited with approval. The Federal Court of Malaysia in *Intelek Timur* also regarded as 'well settled' law that an arbitration award is final, binding and conclusive and can only be challenged in 'exceptional circumstances'.

[10] The following passage found in the judgment of Siti Norma FCJ has been cited in numerous decisions:

> The law regarding the effect of an arbitration award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award. 'It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood'.

[11] See also *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113, *Hartela Contractors Ltd v Hartecon JV Sdn Bhd Anor* [1999] 2 MLJ 481.

[12] *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, on a more general level, is an undoubted authority accepted by the cases in Malaysia, on the issue of the extent to which the High Court can interfere with the findings of fact by an arbitral tribunal:

> … this is not a re-hearing. … I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood …' (per Raja Azlan Shah (as His Majesty then was) at p 211).

SUMMARY OF THE PLAINTIFF'S GROUNDS IN CLAIM

[13] The grounds raised by the plaintiff in this action in reference to the alleged error of law on the face of the award run as follows:

(a) the arbitrator has misconstrued the law and has committed a fundamental error of law which was material to the decision he made;

(b) the arbitrator has failed to construe the relevant clauses in the building contract in its entirety and has thereby deprived the plaintiff of its claim for loss and damage;

(c) the arbitrator has failed to address and/or apply the applicable legal provisions in his award despite the provisions being argued before him during the arbitral proceedings;

(d) there has been a miscarriage of justice as the impugned finding ie that the

termination of the contract was lawful, was fundamental to the reasoning or outcome of the award which was contrary to law and/or public policy; and

(e) the questions of law substantially affect the rights of the plaintiff.

BACKGROUND FACTS

[14] The plaintiff was the appointed main contractor for a construction project involving the building of a school complex of three blocks of a three-storey building, one block comprising the canteen and connected works. The parties employed the Form JKR 203 (Revised 10/83) Contract. The Government of Malaysia (Jabatan Kerja Raya) was the employer. The agreed contract sum was RM4,186,088 with a contract completion period of 72 weeks ending 18 January 2001. There were delays in the execution of the works (according to the plaintiff, not wholly arising from causes attributable to the plaintiff). The plaintiff made two applications for extensions of time, one dated 11 December 2000 (EOT No 1) for extension of the completion date to 15 April 2001, and the second dated 15 March 2001 (EOT No 2) for extension of the completion date to 30 June 2001.

[15] On 27 February 2001, the defendant purported to issue a notice of default ('NOD'), ie even before a reply was received for EOT No 1. This NOD was received by the plaintiff on 5 March 2001. To quote this 'Notis Untuk Tujuan Penamatan Pengambilan Kerja Kontraktor':

> Dukacita dimaklumkan bahawa tuan didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak akan disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 16 Januari 2001. Berdasarkan kepada Laporan Skala Pengesahan Projek JKR Kinta sehingga 31 Januari 2001, kerja tuan sepatutnya sudah 100% siap tetapi kemajuan yang dicapai sehingga ke tarikh 31 Januari 2001 adalah hanya 75%.

[16] EOT No 1 was assessed, and an extension of time of 30 days up to 15 February 2001 was granted. This EOT was granted by certificate dated 5 March 2001 which was received by the plaintiff on 27 March 2001. EOT No 2 was not at all assessed.

[17] A certificate of non-completion ('CNC') was issued dated 6 April 2001. It was received by the plaintiff on 17 April 2001. LAD was claimed.

[18] What followed next was a termination letter dated 6 April 2001 which was received by the plaintiff on 17 April 2001. The ground for termination was

purportedly because 'didapati masih tidak menjalankan kerja dengan lebih pesatnya'. Reference was made to cl 51 of the conditions of contract.

[19] On 6 April 2001 the defendant made an immediate demand on the performance bond provided by the plaintiff for the sum of RM209,304,04. The defendant then suspended the plaintiff's licence. There was no post-termination site inspection or measurement of works. According to the plaintiff, it subsequently submitted its progress claims 12–80, for an alleged percentage of completion of 92%. This was on 12 April 2001.

[20] The plaintiff disputed the notice of termination on 18 April 2001. A replacement contractor was appointed and a unilateral final account for the sum of RM664,986.42 was purportedly issued. This was protested to, and the sum was subsequently revised to RM490,681.60. A further deduction was made for the sum of RM173,424.82 which was a sum allegedly owing by the plaintiff to the defendant under another separate contract.

THE SIX ISSUES BEFORE THE ARBITRATOR

[21] At the arbitration, the learned arbitrator addressed six principal issues:

Issue 1

Whether the Claimant is entitled to further extension of time and that time for completion is set 'at large'.

Issue 2

Whether the issuance of the Certificate of Non-Completion (CNC) for the Works by the Respondent is wrongful and invalid and that the subsequent imposition of liquidated ascertained damages (LAD) is therefore, invalid.

Issue 3

Whether the Respondent's determination of the Claimant's Contractor's Employment under the Contract (Termination of Contract) is lawful and valid.

Issue 4

Whether the Claimant is entitled to seek recovery of the performance bond for which the Respondent demanded and encashed in the sum of RM209,304.40.

Issue 5

If Issue No 3 is non-affirmative, whether the Claimant is entitled to loss and damages, in the aggregate sum of RM35,785,239.42.

Issue 6

If Issue No 3 is affirmative, whether the Respondent is entitled to recover costs in the sum of RM664,986.42 arising from the Final Accounts prepared by the Respondent in accordance with JKR's Circular No 4/1990.

THE ARBITRATOR'S FINDINGS

[22] The first two issues were decided in the plaintiff's favour as the claimant. With respect to issue No 1, the learned arbitrator's analysis of the facts and his findings on the main and sub-issues can be found at paras 71–173 of the final award. He eventually held that the claimant was entitled to an aggregate EOT of 76 days, which extended the original date of completion from 16 January 2001–2 April 2001. In para 173 the learned arbitrator held:

> On the basis of evidence, I find for the claimant and further hold that the time for completion of the works is set 'at large' and that the claimant contractor is obligated to complete the remaining works within a reasonable time.'

[23] As regards issue No 2, the learned arbitrator held very clearly at para 191:

> As a general principle of law the issuance of a valid CNC is a condition precedent to the operation and imposition of liquidated ascertained damages (LAD). Given my finding that the issuance CNC was improper, wrongful and invalid, I further hold that the imposition of LAD on the claimant contractor, is therefore unlawful in the circumstances.

[24] At para 185 he referred to the Court of Appeal decision in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185 for the proposition that a certificate of non-completion (CNC) would be invalid if an architect had not properly assessed the contractor's request for extension of time so that the architect could not know therefore the precise completion time since time would no longer be the essence of the contract in the circumstances. At paras 188–189, he expressed the view that given his earlier finding of the claimant that the time the completion of the works or set 'at large', the issuance of the certificate of non-completion (CNC) by the respondent was therefore wrongful and invalid in the circumstances.

THE PLAINTIFF'S ARGUMENTS

[25] The plaintiff is in total agreement with these findings in relation to issue No 1 and issue No 2, but disputes the arbitrator's finding on issue No 3, basically on the ground that it contradicts his earlier findings, is illogical, not consonant with the law on 'time being at large, and is otherwise a finding that no reasonable arbitrator would have reached. In para 238 of the final award, the learned arbitrator concluded:

> On the basis of evidence, I find for the respondent and therefore hold that the respondent's determination of claimant contractor's employment under the contracts (termination of contract) is lawful and valid.

[26] Latching on this finding on issue No 3, the plaintiff has argued strongly that there has been a clear or manifest error of law on the face of the war (arising out of the award) since arbitrator had failed to address and apply the relevant legal provisions in his award despite these provisions being argued before him during the arbitral proceedings. Counsel refers in particular to the alleged failure to appraise the effect, or the failure of the arbitrator to apply his mind, to the findings of the Court of Appeal in *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 and *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185. The inconsistent and illogical outcome is argued as follows. The learned arbitrator had earlier held that the contract time was 'at large' and therefore the plaintiff had a reasonable time to complete the works such that the contract time was no longer of the essence, and yet he upheld the notice of termination which was based essentially on a timeline which was no longer operative. The termination of the contract on 6 April 2001 was traceable to the NOD issued earlier on 27 February 2001 which expressly referred to the earlier contract completion date. According to counsel, in *Pembinaan LCL* it was said:

> It is crystal clear that the respondent had acted in breach of contract by issuing the termination notice based on a time frame that was no longer operative … (per Gopal Sri Ram JCA at para 24, p 208 of the report).

[27] This, it was argued, was the position on the facts of this action. The learned arbitrator, in finding the determination notice valid, had relied on a contract completion date which was no longer operative since by his own earlier finding time had been 'set at large'.

[28] As for the failure to apply his mind correctly to the decision in *Nirwana Construction*, the following passages of the Court of Appeal in that case are emphasised:

> There appears to be non-compliance with *the* requirement of cl 51, in that the notice did not contain the precise ground of termination.
>
> Thus, in itself the notice was bad … (per Zainun Ali JCA at p 176 of the report).

[29] If I understand the submission by the plaintiff's counsel correctly, the point being made here is that the *Nirwana Construction* decision requires the exact words in cl 51 to be used in the notice of termination. If the exact words are not use, the notice in itself is bad. This is how the submission is advanced in the written submission, which I quote below:

37. In the case of Nirwana construction Sdn Bhd, it was held that the words 'Dukacita diperhatikan bahawa tuan didapati masih tidak menjalankan kerja-kerja dengan lebih pesatnya …' (same words used in the notice of termination in the present case) were not accepted as a precise ground termination required under clause 51 of the conditions of contract.

38. It is further pertinent to bring to the attention of this honourable court that the contents of the notice of termination in Nirwana Construction was substantially in the same manner and form as that in this case. It was held there by the court of appeal that the notice was null and void and of no effect as it failed to comply with clause 51 of the contract (as in this case).

IRRATIONALITY/ILLOGICALITY ARGUMENT

[30] To support his argument that the court can set aside, remit or vary an award on the basis of illogicality, strong reliance was placed on *Edwards v Bairstow* [1956] AC 14, a leading English decision in relation to an appeal by way of case stated, where Lord Radcliffe had eloquently stated:

> When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination and the appeal. In those circumstances, too, the court must intervene …

[31] The court's attention was drawn to the House of Lords cases in 'The Nema' (*Pioneer Shipping Ltd and others v BTB Tioxide Ltd; The Nema* [1981] 2 All ER 1030) and 'The Antaios' (*Antaios Cia Naviera SA v Salen Rederierna AB; The Antaios* [1984] 3 All ER 229, where *Edwards v Bairstow* was cited with approval.

[32] The extent to which the principles in *Edwards v Bairstow* can apply in arbitration law is a matter of some dispute. In *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* (which was referred by counsel for the plaintiff in submission) I have discussed the ramifications which can result from a wholesale adoption of the *Edwards* principles in arbitration matters, and I do not propose to repeat them here.

[33] Senior federal counsel for the defendant has in turn referred to an American decision in *Perkins Restaurants Operating Co, LP v Van Den Bergh Foods Co* (1995) 276 111 App 3d 305, and the passage reading:

> … An illogical or inconsistent decision on the part of the arbitrator is not a sufficient basis upon which to overturn an arbitration award.

[34] In this regard, senior federal counsel has even gone to the extent of arguing that an arbitral tribunal cannot be regarded as being strictly bound by judicial precedent, again citing several American authorities in support. This argument is taken in reference to the plaintiff's counsel reliance on *Nirwana Construction* and *Pembinaan LCL*. See also *David M Sapp et al, Appellants v Abraham Barenfeld et al, Respondents (Supreme Court of California),* 34 Cal 2d 515: Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action …' (at para 12 of the judgment)'.

ILLEGALITY PRINCIPLE

[35] As for *Edwards v Bairstow*, I would venture to suggest that 'the jury is still out' on the issue of its applicability in arbitration law, but it will be difficult in a clear case for any court to ignore a patently clear instance of an illogical award, however much one would like to defer to the principle of party autonomy in the selection of their own forum of choice. At least in the instance where an issue of construction of the law is referred to an arbitrator to decide, our Federal Court has recently reaffirmed the position of non-interference in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441:

> We note that the arbitrators were faced with a question on the construction of the clause in an agreement. From the reading of it, no doubt it could be given to interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned majority arbitrators to one approach interpretation (which was in favour of the respondents) over the other cannot be ground for challenge.
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> And Scrutton LJ put it '… If you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom he chose makes a mistake and law that is you look out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment (see *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd (1930)* … cited with approval by the Court of Appeal in *Dato' Tiong Teck Kim & others v Dato' Tiong Teck Leng* [1996] 1 MLJ 178 …' (per Richard Malanjum CJ (Sabah and Sarawak) at p 462 of the report).

[36] But the Federal Court in this case has also comprehensively referred to the leading cases in Malaysia such as *Sharikat Pemborong Pertanian, Ganda Edible Oils and Intelek Timur* , and rationalised the principles. To interfere, an award 'must be tainted with some sort of illegality'. I quote the pertinent passages:

> The next point requiring to be considered is:

(a) whether the cases of *Ganda Edibile* and *Intelek Timur* introduced a ground for challenge in cases where a specific reference was made for arbitration, namely, that an act of illegality has been committed by the arbitrator, such as deciding on evidence which was not admissible, or on principles of construction which the law does not countenance; and

(b) whether the question of construction of a contract is a question of law, which if specifically referred to arbitration, ought to fall within the ambit of the above distinction as laid down in *King v Duveen*.

… With reference to item (a), in *Ganda Edible Oils*, Barakbah SCJ stated the following:

> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

A substantial portion of these words were reproduced by this court in *Intelek Timur*. However, it must be pointed out that both cases expressly endorsed *Sharikat Pemborong*.

In our view the Supreme Court in Ganda Edible Oils and the Federal Court Intelek Timur did not introduce any new ground for challenge. Both cases merely reiterated a fundamental principle of law, to wit, that if a decision of an arbitrator is tainted with illegality, it is always open for challenge. Thus, even where a specific reference has been made to the arbitrator, if the award subseguentlv made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. It must be stressed here that the award must be tainted with some sort of illegality. It must also be emphasised that the word 'may' is used here, in that the award may be set aside. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it (at p 457 of the report).

[37] I add the necessary emphasis above. Likewise, on the facts of the present case it will be of importance to establish whether the award has been tainted with 'any sort of illegality', recognising that the court has the discretion to exercise its jurisdiction whether to set aside, vary, remit or respect the decision of the learned arbitrator.

THE COURT'S FINDINGS

[38] At the level of preliminary consideration, I must admit the submissions marshalled by the plaintiff's counsel have a convincing air to it, but judicial

discretion requires the award to be explored more properly and comprehensively, and assessed in accordance with the settled principles I have earlier analysed at the outset of this judgment. What appears as an illogical conclusion may upon this platform of analysis lead to different assessment when viewed from the perspective of the findings of fact and application of the law.

[39] Upon reading the final award as a whole, I find the learned arbitrator has devoted an in-depth analysis of issue No 3, from paras 192–238, before finally concluding, as stated earlier '*On the evidence*, I find for the Respondent and therefore hold that the Respondent's Determination of Claimant Contractor's Employment under the Contract (Termination of Contract) is lawful and valid'.

[40] It is of the utmost importance to stress that the findings of the learned arbitrator was reached upon a full consideration of the evidence in support of the breach of cl 51(a)(ii), reading in its material parts (in Bahasa Melayu):

> 51(a) Tanpa menjejas apa-apa hak atau remedi lain yang dipunyai oleh Kerajaan, jika Kontraktor melakukan kemungkiran mengenai mana-mana satu atau lebih daripada perkara-perkara yang berikut, iaitu:
>
> …
>
> (ii) *jika ia papal meneruskan Kerja dengan mengikut aturan dan tekunnya …*
>
> maka P.P. boleh memberi kepadanya suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran menyatakan kemungkiran itu, dan jika Kontraktor samada meneruskan kemungkiran itu selama empat belas (14) hari selepas penerimaan notis itu atau pada bila-bila masa selepas itu mengulangi kemungkiran itu (samada pernah diulangi dahulu atau tidak), maka Kerajaan boleh dengan demikian itu melalui suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran yang direkodkan menamatkan pengambilan kerja Kontraktor dibawah Kontrak ini.

[41] I find the learned arbitrator had considered the evidence in relation to the failure to 'proceed regularly and diligently with the Works' from paras 192–276, and came to firm findings of fact on the evidence that the NOD and the subsequent termination was not mala fide, unconscionable or wrongful. He also firmly concluded: I therefore find the claimant's argument that 'the CNC itself would have superseded the event complained of in the Notice of Default' untenable as they are both different and unrelated provisions in the Contract (para 222).

[42] See also other important findings of fact in para 211:

> From the above trail of letters, serving as warning and reminder letters to the Claimant Contractor on the lack of progress and unsatisfactory works on site, I FIND, on the balance of probabilities for the Respondent and further HOLD that the Notice of Default (Notice of Determination of Contractor's Employment), as in C2.63, was not vexatious nor unreasonable but properly issued in the circumstances.

[43] As for the alleged failure not to have considered or applied his mind to *Nirwana Construction*, the short point is, he did. See paras 232–237. At para 237, the learned arbitrator concluded:

> I disagree with the claimant's submission and I FIND the reason stated in para 2 of C2.55 falls within the ambit of cl 51(a)(ii) of the contract on ground of 'failure to proceed regularly and diligently with the Works'. In addition, the respondent has right to terminate the contract under common law if the progress of works is unsatisfactorily slow with inadequate resources and workers on site.

[44] Quite apart from the express reference to the case in the final award, I have also considered and evaluated the principle submitted to be the principle established by this Court of Appeal decision, as argued by the plaintiff's counsel, ie, as earlier quoted:

> There appears to be non-compliance with *the* requirement of clause 51, in that the notice did not contain the precise ground of termination.
>
> Thus, in itself the notice was bad …

[45] With all due respect, after perusing the entirety of the judgment, the passage quoted by counsel is no authority to support a principle of slavish adherence to the exact wording of cl 51. Much turns on the precise facts and on the substance of the relevant termination letter. The correspondence in *Nirwana Construction* did not show on what precise ground the termination was made. This is not the case on the present facts here.

[46] There is therefore no pressing need to consider whether an arbitrator can disregard judicial precedent, since he is not part of the judicial institution. I would however venture to suggest that if he be so bold as to ignore clear case authority, this would be a classic case of interpreting the law on principles not countenanced by the law, which in any event is an accepted and established facet of error of law on the face of the award.

[47] Seen in its entirety, I do not find the findings in the final award illogical or inconsistent. The learned arbitrator has come to definite findings on the evidence and has found the issues of CNC and EOT to be separate from the issue of failure to proceed regularly and diligently with the works which

afforded a cause for termination under cl 51 of the contract. There cannot be said to be any illegality or irrationality in the *Edwards v Bairstow* sense, even on the assumption it applies. It cannot be plausible concluded that on the present facts no reasonable arbitrator would have reached the same conclusions. While one can accept the principle that 'there cannot be one law for arbitrators and another for the court', and 'there is one law for all', such that if a contract is illegal 'then arbitrators must decline to award upon it just as the court would do' (per Lord Denning LJ, as he then was, in *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 WLR 562), it is equally important to realise the limits of the court's jurisdiction in these matters, which is limited to the correction of 'arbitral' not 'appellate' errors.

[48] In this connection, the pronouncements of the judicial committee in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] NZLR 338(included as an appendix in the *Gold & Resource Development (NZ) Ltd v Dough Hood Ltd* [2000] 3 NZLR 318 case, which I cited earlier in *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd*), deserve to be re-quoted:

> Arbitration is a contractual method of resolving disputes. By their contract parties agreed to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the court the losing party may afterwards be tempted to think better of it, and ask the court to interfere because the arbitrator has misunderstood the issues, believed unconvincing witness, decided against the weight of evidence, or otherwise arrived at a wrong conclusion. All develop systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made the choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complaint.

[49] So it should be in the total circumstances of the present case, for there is no error of law on the face of the award, or arising out of the award, established.

CONCLUSION

[50] By way of conclusion therefore, the questions to be determined as listed in Appendix A are answered in the negative in respect of Questions 1–4. There are no errors of law arising out of the final award. Question 5, being dependent on an affirmative answer to questions 1–4, becomes irrelevant. As for Question 6, and consequent to the negative answers to Questions 1–4, the answer to Question 6 is also in the negative; there is no error of law arising out of the award since the matters specified in Question 6 touch and concern inferences from the evidence and are not 'arbitral errors'.

[51] The plaintiff's claim, as particularised in Appendix B, is hence dismissed with fixed costs RM10,000 to be paid by the plaintiff to the defendant.

Claim dismissed with costs.

Reported by Ashok Kumar